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In The

Supreme Court of the United States

October Term, 1993

STATE OF TENNESSEE,

Petitioner,

vs.

WILLIE SPARKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a capital felony murder prosecution, the Eighth Amendment prohibits the sentencer from considering as an aggravating circumstance that the murder was committed in the perpetration of a felony?

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No. _____

In The

Supreme Court of the United States

October Term, 1993

STATE OF TENNESSEE,

Petitioner,

vs.

WILLIE SPARKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

PETITION FOR WRIT OF CERTIORARI

The petitioner, State of Tennessee, respectfully prays that a *writ of certiorari* issue to review the judgments and opinions of the Supreme Court of Tennessee entered on May 10, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee in *State v. Willie Sparks* filed on May 10, 1993, is designated as not for publication. The opinion appears as Appendix "A".

JURISDICTION

The judgments of the Supreme Court of Tennessee in *State v. Sparks* were entered on May 10, 1993. This petition was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Respondent Willie Sparks

Willie Sparks was convicted of first degree murder and armed robbery by a jury in Hamilton County, Tennessee, on May 11, 1984. Following the sentencing hearing, the jury returned a verdict finding that the respondent should receive the death penalty. The jury found that two aggravating circumstances were present: (1) that it was committed while the defendant was engaged in committing a felony. Tenn. Code Ann. § 39-2-203(i)(7) (1982); and (2) that the respondent was previously convicted of one or more felonies, other than the present charge, which involved the use of threat or violence to the person. Tenn.

Code Ann. § 39-2-203(i)(2) (1982). The jury further found as is required by Tennessee statute, that the aggravating circumstances sufficiently outweighed the mitigating circumstances and sentenced respondent to death by electrocution.

On March 2, 1987, upon automatic direct review under Tenn. Code Ann. § 39-13-205(a), the Supreme Court of Tennessee affirmed the respondent's conviction. On October 5, 1987, this Court denied the respondent's Petition for *Writ of Certiorari.*

On November 16, 1987, the respondent filed a Petition for Post-Conviction Relief alleging that his constitutional rights were violated and further alleging that he was deprived of his Sixth Amendment right to effective assistance of counsel at the guilt/innocence phase and the sentencing phase of his trial. His Petition for Post-Conviction Relief was subsequently amended on June 30, 1989, and September 8, 1989. Following an evidentiary hearing, on March 20, 1991, the respondent's petition was denied and on April 5, 1991, an order was entered dismissing the respondent's Petition for Post-Conviction Relief. On June 11, 1992, the Court of Criminal Appeals of Tennessee affirmed the trial court's denial of the respondent's Petition for Post-Conviction Relief. The respondent filed an application for permission to appeal to the Tennessee Supreme Court which was granted in an order filed on December 1, 1992. This grant was limited to the question of whether the improper use of the felony murder aggravating circumstance, Tenn. Code Ann. § 39-2-203(i)(7) (1982), can be considered harmless error. In an opinion filed on May 10, 1993, the Supreme Court of

Tennessee remanded the case for resentencing. In reversing the respondent's death sentence the majority of the Supreme Court of Tennessee relied on its opinion in the case of *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), *cert. granted*, ___ U.S. ___, 113 S. Ct. 1840 (April 19, 1993) (No. 92-989), in which the same majority held that the use of the felony murder aggravating circumstance to impose a death sentence in the case of felony murder violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. The Court held that the use of this aggravating circumstance cannot be considered harmless error.

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

1. The decisions of the Supreme Court of Tennessee are not in accord with applicable decisions of this Court.

The decision of the Supreme Court of Tennessee in this case erroneously concluded that Tennessee's death penalty statute fails to narrow the class of death-eligible defendants adequately where a defendant is convicted of felony murder, and one of the aggravating circumstances found by the jury in the sentencing phase is the felony murder aggravating circumstance. In this opinion the court did not engage in any independent analysis; rather

the court relied solely on its opinion in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), *cert. granted*, ___ U.S. ___, 113 S. Ct. 1840 (April 19, 1993) (No. 92-989). In *Middlebrooks*, the court concluded that such duplication violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because there is insufficient narrowing of those eligible to be sentenced to death. The majority of the Supreme Court of Tennessee opined that the result is a violation of *Furman v. Georgia*, 408 U.S. 238 (1972), because the jury is given unfettered discretion to determine who would receive the death penalty and who would not. Quite clearly, this is an erroneous interpretation of *Furman*. *Furman* requires that the sentencer's discretion be directed, limited and exercised in an informed manner so as to avoid the arbitrary and capricious imposition of the death penalty. Indeed, "the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring the examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

The concept of "narrowing" contained in the majority opinion of the Supreme Court of Tennessee in *Middlebrooks* is not found in *Furman* nor in any other opinion of this Court. Rather, where the statutory scheme includes aggravating circumstances which are not unconstitutionally vague so as to adequately channel the jury's sentencing decision, capital punishment may be imposed without violating the Eighth Amendment. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). This Court has explicitly

held that there is no Eighth Amendment prohibition against using an element necessary for conviction as an aggravating circumstance to support the imposition of the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The Supreme Court of Tennessee in *Middlebrooks* also grossly misinterpreted this Court's opinions in *Tison v. Arizona*, 481 U.S. 137 (1987), and *Enmund v. Florida*, 458 U.S. 782 (1982). The Supreme Court of Tennessee essentially held that *Tison/Enmund* provides a base line from which the statutory scheme must narrow all felony murderers to those felony murderers eligible for the death penalty. In so doing, the Tennessee Supreme Court erroneously distorted the relationship between the Eighth Amendment concepts of "narrowing" and "proportionality". The issue in *Tison* and *Enmund* was whether the death penalty was a proportional punishment under the Eighth Amendment for certain types of felony murder. This Court in *Tison* concluded that imposition of capital punishment in a felony murder case does not violate the Eighth Amendment if the defendant killed, intended to kill or acted with reckless indifference to the possibility that his victim would in fact die. *Tison* did not involve, and in fact did not even mention, the concept of "narrowing" relied upon by the Tennessee Supreme Court. The Tennessee Supreme Court did not find that the death penalty was disproportionate in these cases.

In *Middlebrooks*, the Supreme Court of Tennessee concluded that the state statutory scheme is coextensive with the proportionality standard for felony murder set out in *Tison*. From that conclusion, the court erroneously extrapolated that the class of persons eligible for the death

penalty had not been sufficiently narrowed. This conclusion is erroneous since, if the *Tison* standard is met, death is a proportional punishment for felony murder as defined by Tennessee's statute, and Tennessee's statute therefore necessarily narrows the class of *all* murders into a subset of those who truly deserve the punishment of death. The Supreme Court of Tennessee seriously misinterpreted *Tison* and *Enmund* as holding that the Eighth Amendment required a statutory definition of capital murder which would narrow the set of all felony murders who meet the Eighth Amendment standard as set out in *Tison* into yet another subset of felony murders. This is not required by the Constitution or any opinion of this Court. Rather, the Constitution simply requires that a statutory scheme define capital murder in a way that narrows the set of all murders into a subset of those that truly deserve the imposition of the death penalty.

The Supreme Court of Tennessee also erred in looking only at the single aggravating circumstance in determining whether there was sufficient narrowing to satisfy the Constitution. Aggravating factors are but one portion of the sentencing scheme. *Furman* requires that the system *as a whole* provide a narrowing function. The system must be examined as a whole. In Tennessee, the jury's discretion is channeled by virtue of the requirement of a bifurcated proceeding, consideration of mitigating factors, and the direction which the jury receives with regard to how to weigh the various sentencing factors. In addition, Tennessee's statute requires that the appellate court review all cases in which the death penalty is sought to ensure that the death penalty is not imposed in an arbitrary and capricious manner. All of these statutory

safeguards work together to ensure that the jury is not given unfettered discretion to determine who lives and who dies.

In *Proffitt*, 428 U.S. at 258, this Court held that the *Furman* requirements are "satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." In *Proffitt*, this Court implicitly approved the application of the death penalty where the defendant was found guilty of felony murder, and felony murder was also used as an aggravating circumstance. This Court further held that Florida's capital sentencing scheme satisfied the constitutional requirements set out in *Furman*. Tennessee's statute is based largely upon the Florida statute and is almost identical to it. Clearly, the Tennessee Supreme Court's decisions conflicts with *Proffitt* and misinterprets this Court's opinions in *Tison*, *Enmund* and *Lowenfield*.

2. The state court decided a federal question in holding that an aggravating circumstance cannot duplicate an element of the crime.

In *Middlebrooks* the Tennessee Supreme Court intermingled its reliance upon the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. By granting the State of Tennessee's Petition for the *Writ of Certiorari* in *Middlebrooks*, this Court has determined that the Tennessee Supreme

Court's decision did not rest on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032 (1983). Accordingly, this Court has jurisdiction to entertain this matter since in this case the Tennessee Supreme Court relied solely on *Middlebrooks*.

B. IN ANY EVENT, THIS COURT SHOULD HOLD THIS CASE PENDING THIS COURT'S DECISION IN *TENNESSEE V. MIDDLEBROOKS*.

The central issue in this case, namely, whether the Eighth Amendment is violated by the State's use of an aggravating circumstance of "commission of murder during a felony" in a case where the defendant was convicted of felony murder, is identical to the issue presented in *Tennessee v. Middlebrooks*, No. 92-989. As was previously noted, in this case the Tennessee Supreme Court did not engage in any independent analysis but relied solely on its opinion in *Middlebrooks*. Accordingly, this Court's ruling in *Tennessee v. Middlebrooks* will be dispositive of these matters. Thus, a hold pending this Court's decision in *Tennessee v. Middlebrooks* is appropriate and warranted.

CONCLUSION

For the reasons stated, the petitioner urges this Court to hold this case pending this Court's decision in *Tennessee v. Middlebrooks*.

Respectfully submitted,

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IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

WILLIE SPARKS, Petitioner/Appellant,	)	Not for Publication
	)	Filed: May 10, 1993
vs.	)	No. 03S01-9212-CR-00105
STATE OF TENNESSEE, Respondent/Appellee.	)	Hamilton County
	)	Hon. Douglas A. Meyer, Judge

(Filed May 10, 1993)

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REMANDED FOR RESENTENCING

Martha Craig Daughtrey, Justice

OPINION

We granted permission to appeal in this post-conviction action in order to determine whether the use of the felony-murder aggravating circumstance, T.C.A. § 39-2-203(i)(7) (1982), to support the death penalty for felony-murder was harmless error in this case. We hold that it was not and remand the case for resentencing. In

addition, we direct that evidence introduced at the first trial, allegedly in violation of *Massiah v. United States*, 377 U.S. 201 (1964), be excluded from the jury's consideration upon retrial.

The petitioner, Willie Sparks, was convicted by a jury of armed robbery and felony-murder and was sentenced to death. As summarized in *State v. Sparks*, 787 S.W.2d 480 (Tenn. 1987), the state's evidence indicated that Sparks, in association with three other men, was involved in an armed robbery at an East Chattanooga liquor store, during which the petitioner shot and killed a delivery man. At the sentencing hearing, the prosecutor used two aggravating circumstances to support the death penalty. First, the state relied on evidence from the guilt phase of the trial to prove that the murder was committed in the course of a violent felony, an aggravating circumstance under T.C.A. § 39-2-203(i)(7)(1982). The state also presented evidence of the petitioner's three prior robbery convictions, an aggravating circumstance under T.C.A. § 39-2-203(i)(2). The petitioner's counsel presented no evidence on his client's behalf, and the jury sentenced Sparks to death.

Although the petitioner seeks post-conviction relief on several grounds, the dispositive issue at this point in the litigation is whether the improper use of the felony-murder aggravating circumstance, T.C.A. § 39-2-203(i)(7) (1982), can be considered harmless error.

In *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), this Court held that it is unconstitutional to use the felony-murder aggravating circumstance, T.C.A. §§ 39-2-203(i)(7)(1982) or 39-13-204(i)(7) (1991), to support

the death penalty upon conviction of felony-murder. We reasoned that the use of an aggravating circumstance that mirrors the underlying crime fails to narrow the class of death-eligible murderers as required by the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Middlebrooks*, 840 S.W.2d at 346.

Having prohibited the use of the felony-murder aggravating circumstance in felony-murder cases, we must determine whether the *Middlebrooks* error in this case is harmless, given uncontested evidence of Sparks's three prior violent felony convictions, which were introduced collectively as an additional aggravating circumstance at trial. The federal constitution permits harmless error analysis after the invalidation of one aggravating circumstance. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990). In prior cases, however, we have found harmless error analysis difficult to sustain in the absence of written findings by the jury concerning mitigating circumstances. *See, e.g., State v. Terry*, 813 S.W.2d 420, 424-5 (Tenn. 1991). Considering the "heightened need for reliability in death cases," we refused in *Terry* to predict what the outcome of the case would have been in the absence of one of the aggravating circumstances. Similarly, in *State v. Pritchett*, 621 S.W.2d 127, 129 (Tenn. 1981), we declined to "speculate" on what the jury's sentence would be when one of two aggravating circumstances was removed from consideration.

The current sentencing statute, T.C.A. § 39-13-204(g), like its predecessor, T.C.A. § 39-2-203(g), requires the jury

to engage in a careful weighing process, balancing specified aggravating circumstances against any mitigating circumstances in the record. But, also like its predecessor, it does not require the jury to report in its verdict what mitigating factors were considered. Without a sufficient basis for reweighing the evidence in the record, we are disinclined to speculate in this instance about what verdict the jury might have returned based on proof of a single aggravating circumstance. Certainly, we cannot say that in the absence of the felony-murder aggravating circumstance, there is proof beyond a reasonable doubt that the defendant should be sentenced to execution.

In remanding the case for resentencing, we add one note of caution. On direct appeal, petitioner Sparks alleged error by the trial judge in failing to suppress evidence concerning a conversation that Sparks had with one of his accomplices while he, Sparks, was being held pending trial in the Chattanooga jail. The petitioner contended that this evidence was introduced in violation of *United States v. Massiah*, 377 U.S. 201, in which the United States Supreme Court held that the Sixth Amendment right to counsel is violated when police deliberately elicit incriminating statements from a defendant after indictment[1] and in the absence of the defendant's counsel. *Massiah*, 377 U.S. at 203-06.

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[1] In *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972), the court further explained that this Sixth Amendment right applies after the initiation of "adversary judicial proceedings," such as a formal charge, preliminary hearing, indictment, information or arraignment. In Tennessee, "[i]nitiation [of adversary judicial proceedings] is marked by formal charge, . . . construe[d] to be an arrest warrant, . . . preliminary hearing, or . . . indictment or presentment. . . . " *State v. Mitchell*, 593 S.W.2d 280, 286 (Tenn. 1980).

The facts presented at the hearing on motion to suppress are set out in detail in this Court's opinion on direct appeal. *Sparks*, 727 S.W.2d at 482. In short, they show that while Sparks was incarcerated, he telephoned one of his accomplices, Michael Jones, and asked Jones to come to the jail. Jones reported this invitation to police and agreed to be wired with a microphone during his visit. The conversation between Sparks and Jones was overheard and tape-recorded by a police detective, who was called by the prosecution to testify about incriminating statements that Sparks made to Jones during the jail visit. *Id.*

By a vote of three-to-two, we affirmed the trial court's order denying suppression. The two dissenting members of the Court felt strongly that the evidence in question violated *Massiah*, and that its introduction at trial constituted reversible error. *Id.* at 484-89. The other three members did not decide whether or not error had occurred, holding instead that if the introduction of this evidence *did* constitute error, it was harmless beyond a reasonable doubt. To support this conclusion, the majority found that "the jail statements of [Sparks] testified to at trial were cumulative and their contents had already been proved by other evidence which was overwhelming." *Id.* at 482.

This holding constitutes the law of the case with regard to the petitioner's conviction of first-degree murder. It is not binding, however, on the question of his sentence, which must be retried as a result of other error in the record. The question, then, is whether evidence of the conversation between Sparks and Jones can be admitted at the new penalty hearing. We think not. Although a

majority of the Court did not hold that admission of the disputed evidence was reversible error on direct appeal, it is equally true that a majority did not find to the contrary.

What the majority did say was that the error, if any, was not sufficiently prejudicial to require a new trial on the issue of guilt or innocence. It is obvious, however, that "harmless error" depends for its finding of harmlessness on a *post hoc* determination that measures the error in the context of the proof as a whole. Certainly, we cannot say in advance of the new penalty hearing that the disputed evidence will be "cumulative" to the other evidence, the extent of which cannot be foretold, or that the other evidence to be presented will be "overwhelming," a matter which also cannot be predicted.

We therefore find it prudent to instruct the trial court not to admit the evidence concerning the jail conversation at the rehearing, given the apparent error that would be injected into the record by its admission.

In conclusion, we cannot say that the *Middlebrooks* error in this case was harmless beyond a reasonable doubt. We therefore remand this matter to the trial court for a new sentencing hearing in accordance with *State v. Middlebrooks*, 840 S.W.2d 317. Similarly, we cannot approve the use of evidence that may have been secured in violation of the federal constitution, and we therefore direct that testimony regarding Sparks's conversation with Jones in the Chattanooga jail cell be excluded from the penalty hearing.

As for the other issues raised on appeal, we conclude that they present no grounds for relief. The record fails to

show that the two attorneys who represented Sparks at the first trial rendered ineffective assistance of counsel at the guilt phase of the trial. Because the petitioner will be represented by different counsel at the new sentencing hearing, we find it unnecessary to address the ineffective assistance of counsel claims made in regard to the penalty phase of the original trial.

Remanded with instructions.

/s/ M.C. Daughtrey
Martha Craig Daughtrey,
Justice

CONCUR:
Reid, C.J.
Anderson, J.

DISSENTING AND CONCURRING OPINION:
Frank F. Drowota, Justice

DISSENTING IN PART AND CONCURRING IN PART:
Samuel L. Lewis, Special Justice

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

WILLIE SPARKS,	)	HAMILTON CRIMINAL
Petitioner-Appellant,	)	Hon. Douglas A. Meyer, Judge
V.	)	
STATE OF TENNESSEE,	)	No. 03S01-9212-CR-00105
Respondent-Appellee.	)	

DISSENTING AND CONCURRING OPINION

In *State v. Middlebrooks*, 840 S.W.2d 317, 347 (Tenn. 1992), I dissented from that part of the majority opinion which held that the use of the aggravating circumstance in T.C.A. § 39-2-203(i)(7)(1982) [now § 39-13-204(i)(7)(1991)] to impose a sentence of death in cases of felony murder violates the Eighth Amendment to the United States Constitution and Article I, § 16, of the Tennessee Constitution. I continue to adhere to the views expressed in my concurring and dissenting opinion in *Middlebrooks* that allowing the underlying felony to act as an aggravating circumstance does not result in imposition of the death penalty in a disproportionate manner. My disagreement with the majority was not based solely on the principle of *stare decisis*. My disagreement arises from my conviction that the previous decisions of this Court[1] are

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[1] *State v. Smith*, 755 S.W.2d 757, 768 (Tenn. 1988); *State v. Barnes*, 703 S.W.2d 611, 618 (Tenn. 1985); *State v. Zagorski*, 701 S.W.2d 808, 816 (Tenn. 1985); *State v. Smith*, 695 S.W.2d 954, 959-960 (Tenn. 1985); *State v. King*, 694 S.W.2d 941, 946 (Tenn. 1985); *State v. Laney*, 654 S.W.2d 383, 387 (Tenn. 1983); *State v. Pritchett*, 621 S.W.2d 127, 139-141 (Tenn. 1981); *Houston v. State*,

not in error and that the statute does not contravene the requirements of either the Eighth Amendment or Article I, § 16. Accordingly, in this case I would find two valid aggravators (T.C.A. § 39-2-203(i)(2) and (7)) and would affirm the Defendant's sentence of death.

However, a majority of this Court, in *Middlebrooks*, held that it is unconstitutional to use the felony murder aggravating circumstance to support the death penalty upon conviction of felony murder. That presently being the law in this state, I cannot say that the *Middlebrooks* error was harmless beyond a reasonable doubt. Therefore, I concur with the remand for resentencing as set out in the majority opinion.

/s/ Frank F. Drowota, III
FRANK F. DROWOTA, III
JUSTICE

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593 S.W.2d 267, 276 (Tenn. 1980). In *State v. Pritchett*, 621 S.W.2d at 140-141, this Court rejected the rationale of *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), adopted by this Court in *Middlebrooks;* and in *State v. Smith*, 755 S.W.2d at 768, we held that our statute complied with the constitutional requirement of "narrowing" under *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

WILLIE SPARKS Petitioner-Appellant VS STATE OF TENNESSEE Respondent-Appellee	)))))))	APP. NO. 03S01-9212-CR-00105 HAMILTON CRIMINAL Hon. Douglas A. Meyer, Judge

DISSENTING IN PART AND CONCURRING IN PART

I concur in that part of the majority opinion that remands for sententencing [sic] because the law at this time in Tennessee is that felony murder may not be used as an aggravating circumstance. ***State v. Middlebrooks,*** 840 S.W.2d 317, 346 (Tenn. 1992).

However, I agree with Justice Drowota's Dissenting and Concurring Opinion in ***State v. Middlebrooks,*** 840 S.W.2d at 347, that to impose a sentence of death in cases of felony murder is not a violation of Article I, § 16 of the Tennessee Constitution. I am also of the opinion that allowing the underlying felony to act as an aggravating circumstance does not result in imposition of the death penalty in a disproportionate manner. I therefore dissent from that portion of the majority opinion which disallows the underlying felony to act as an aggravating circumstance.

/s/ Samuel L. Lewis
SAMUEL L. LEWIS,
Spec. Justice